MERSING OMNIBUS CO. SDN. BHD.

v.

THE MINISTER OF LABOUR & MANPOWER & ANOR.

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH LP
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER FJ
[CIVIL APPEAL NO. 203 OF 1982]
31 MARCH 1983

ADMINISTRATIVE LAW: *Certiorari - Leave to apply for - Whether learned Judge had jurisdiction to grant - Whether jurisdiction originates in the consent of the parties - Whether time runs from the date of the decision or from the date it was taken cognizance of.*

A trade union recognition dispute between the appellant and the second respondent was referred to the Minister of Labour and Manpower who on 23 November 1981 decided that the appellant extend recognition to the second respondent as from 22 June 1981. However the appellant by an *ex parte* motion taken out on 9 January 1982 sought leave to apply for *certiorari* to quash the decision of the Minister. Leave was granted and the appellant applied by a substantive motion for *certiorari*. The learned Judge Hashim Yeop A. Sani heard the application and dismissed it on 29 July 1982. The appellant appealed.

The question of the appellant being out of time in his application for leave for *certiorari* was raised by the Federal Court. Order 53 r. 1A of the Rules of the High Court 1980, provides that leave shall not be granted to apply for an order of *certiorari* unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made.

The Minister's decision sought to be impugned was dated 23 November 1981 and it expired on 5 January 1982 as per the above provision. When the appellant applied for the leave on 9 January 1982 he was clearly out of time and further no extension of time was sought nor was the delay accounted for to the satisfaction of the learned Judge. At the first instance neither party made any objection but after an overnight adjournment Counsel for both respondents changed their stance and said that the appellant was indeed time-barred.

The issues to be determined were:

(a) whether jurisdiction originated in the consent of the parties and can be established where it is absent by such consent or acquiescence;

(b) whether time runs from the date of the Minister's decision or from the date it was taken cognizance of.

Held:

[1] Jurisdiction does not originate in the consent of the parties and cannot be established where it is absent, by such consent or acquiescence.

[2] Leave should not have been granted to the appellant to apply for *certiorari* without the time prescribed in O. 53 r. 1A and neither sought an extension of time nor accounted for the delay to the satisfaction of the learned Judge within its explicit requirements. The learned Judge had no jurisdiction to do so.

[Appeal dismissed with costs. Deposit to be paid out to the respondents.]

Cases referred to:

Secretary of State for Defence v. Warn [1970] AC 394

Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower & Anor. [1981] CLJ (Rep) 74; [1981] 2 MLJ 199

Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers [1983] CLJ (Rep) 50; [1983] 1 MLJ 175

Merdeka University Berhad v. Government of Malaysia [1981] CLJ (Rep) 191; [1981] 2 MLJ 356

Griffiths & Anor. v. Secretary of State for the Environment & Anor. [1983] 2 WLR 172

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)

Industrial Relations Act 1967, s. 9(5)

Rules of the High Court 1980, O. 53 r. 1A, O. 3 r. 2(2), O. 53 r. 1(1), 1, O. 42, O. 55 r. 13

Rules of Supreme Court [UK], O. 53 rr. 2(2), 4

Other sources referred to:

Supreme Court Practice 1976, Vol. 1 p. 801

For the appellant - S. Kulasegaran; M/s. Ranjit, Thomas and Kula.

For the 1st respondent - Abu Mansor bin Ali, SFC.

For the 2nd respondent - B. Lobo; M/s. Lobo & Associates.

JUDGMENT

Eusoffe Abdoolcader FJ:

A trade union recognition dispute between the appellant and the second respondent was referred to the first respondent, the Minister of Labour and Manpower, who gave his decision on 23 November 1981 in Form D as prescribed by the Industrial Relations Regulations, 1980 that the appellant extend recognition to the second respondent as from 22 June 1981 for the categories of employees stipulated therein. The appellant by an *ex parte* motion taken out on 9 January 1982 sought leave to apply for *certiorari* to quash this decision of the Minister 'made under s. 9(5) of the Industrial Relations Act 1967 and dated the 23 November 1981'. Leave was granted accordingly by an order made by Hashim Yeop A. Sani, J, on 5 February 1982 whereupon the appellant applied by a substantive motion *inter partes* on 17 February 1982 for *certiorari*. The learned Judge heard the application and dismissed it on 29 July 1982 *a quo* the appellant lodge an appeal to this Court.

At the outset of the hearing of this appeal we raised the question of the appellant being out of time in his application for leave for *certiorari* in the light of the provisions of O. 53 r. 1A of the Rules of the High Court 1980, the relevant part of which specifically provides that leave shall not be granted to apply for an order of *certiorari* unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made. As the decision of the Minister sought to be impugned is dated 23 November 1981, the period of six weeks would, on a computation under O. 3 & 2(2) of the Rules of the High Court, expire on 5 January 1982, and as the application for leave was made on 9 January 1982 the appellant was clearly out of time and no extension of time was sought nor the delay accounted for to the satisfaction of the learned Judge who heard the application as required by the rule. Apparently this point completely escaped all parties involved, as a result perhaps of an affliction of incorrigible somnolence that seems to pervade the perception of the law and practice of the profession from time to time. We took the point ourselves as it clearly goes to the jurisdiction of the Court from which leave to apply for *certiorari* was sought as O. 53 r. 1(1) stipulates that no application for an order of *certiorari* shall be made unless leave therefor has been granted and r. 1A which we have already adverted to enacts that leave shall not be granted except in accordance with its specific provisions.

Lord Hodson said in his judgment in *Secretary of State for Defence v. Warm* [1970] AC 394, 402 (at p. 402): "Procedural sections are usually mandatory and there is nothing which points to the contrary in this case". In the matter before us the terms of O. 53 rr. 1 and 1A clearly reflect the imperative requirements which must be complied with before an application for *certiorari* can be made. Power in the High Court in regard to *certiorari* is provided for in the Courts of Judicature Act, 1964 in para. 1 of the Schedule thereto which sets out the additional powers of the High Court referred to in s. 25(2) of the Act but the proviso to s. 25 specifically enacts that all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of Court relating to the same [*Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower & Anor.* [1981] CLJ (Rep) 74; [1981] 2 MLJ 199. We should perhaps mention that when we first put the point in question to Counsel for the respondents for their views, both of them somewhat half-heartedly indicated they were taking no objection on this aspect, presumably because it had never occurred to them before, and that they were prepared to waive non-compliance with the provisions of O. 53 r. 1A if there was any; but after an overnight adjournment granted at the request of Counsel for the appellant, Counsel for both respondents resiled and changed their stance and now said that the appellant was indeed time-barred and in breach of the rule, with Senior Federal Counsel appearing for the Minister stating that this was the result of one night's research, though we did not have the benefit of sharing in the fruits of his research. In any event jurisdiction does not originate in the consent of the parties and cannot be established, where it is absent, by such consent or acquiescence [*Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers* [1983] CLJ (Rep) 50; [1983] 1 MLJ 175].

We have earlier stated that the decision of the Minister is dated 23 November 1981. Mr. Kulasegaran for the appellant concedes that if time runs from that date then the appellant was out of time but he contends that time should only run from the date the appellant received the Minister's decision and had cognizance thereof which was 28 November 1981 and that the appellant was accordingly within time in making its application for leave. He submits that when the Minister gives his decision under s. 9(5) of the Industrial Relations Act this presupposes a communication of his decision and that the date of the Minister's decision must therefore be the date when it is in fact communicated to the parties. We find no merit in this contention in the face of the explicit provisions of O. 53 r. 1A which refer to 'the date of the proceeding'. He referred in argument by way of analogy, as he put it, to the provisions of O. 42 of the Rules of the High Court which have no relevance whatsoever to the issue under consideration. He would have done better to have referred to O. 55 r. 13 which provides for an appeal to the High Court from a decision of any person or body of persons under any written law and sub-rule (2) thereof which declares that unless otherwise provided by any written law, such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date. There is in that sub-rule an express provision on the lines of Mr. Kulasegaran's argument in stark contrast to the explicit phraseology in O. 53 r. 1A which only refers to the date of the proceeding.

The validity of Mr. Kulasegaran's contention must be tested by considering the consequences to which it would lead. Invariably and *ex necessitate rei* a decision of the Minister under s. 9(5) of the Industrial Relations Act and other categories of administrative decisions affect two or more and perhaps a multiplicity of parties. In a matter such as the instant one there will at least be the employer and the trade union claiming recognition and in other cases there might well be several others involved as well. In this event, it would be virtually impracticable and well-nigh impossible to ascertain a settled and agreed date of communication of a decision as this would vary from party to party according to when it received notification

of the decision. This would entail attributing different dates of the decision for different persons and *ipso facto* manifest the extreme improbability of the Rules Committee having intended that the date of the proceeding for the purposes of O. 53 r. 1A should be determined by the date on which notice is severally given to a multiplicity of parties and thereby providing in effect different periods of time for different parties for the purposes of applying for leave for *certiorari*. The ensuing result of the appellant's contention as to manifold and differing dates of a proceeding within the meaning of O. 53 r. 1A where a multiplicity of parties are involved would give the term in question in the rule a somewhat chimeric connotation of a monstrosity with a lion's body, a goat's head and a serpent's tail and perhaps even a variety of other assorted appendages, and indeed be reminiscent and suggestive of the saga of the six sightless sages who on encountering a pachyderm severally felt different parts of its body and then declared vastly differing descriptions of the beast. An analogue to this sort of situation was considered and an appropriate rejoinder administered in *Merdeka University Berhad v. Government of Malaysia* [1981] CLJ (Rep) 191; [1981] 2 MLJ 356. Furthermore the appellant in its application for leave and the substantive motion for *certiorari* and in the title of the proceedings instituted specifically refers to 'the decision of the Minister dated 23 November 1981'. In an application for *certiorari* it is essential to specify the particular order or decision made and sought to be quashed.

Order 53 r. 1A is textually adopted *totidem verbis* (except for the period specified) from O. 53 r. 2(2) of the English Rules of the Supreme Court prior to its amendment in 1977, and in an annotation thereto in Vol. 1 of the 1976 *Supreme Court Practice* (at p. 801) it is specifically stated that the period of time stipulated in the rule after the date of proceeding in an application of leave for *certiorari* runs from the date of the order sought to be removed. The propriety of this construction is reinforced by r. 4 of the new English O. 53 for application for judicial review introduced in 1977 which provides for an application to be made promptly and in any event within three months from the date when grounds for the application first arose and then goes on in sub-rule (2) thereof to define where the relief sought is an order of *certiorari* the date when grounds for the application first arose as the date of the judgment, order, conviction or proceeding.

It is abundantly clear that the date of the proceeding in the matter before us for the purposes of O. 53 r. 1A is *ex visceribus verborum* the date of the Minister's decision set out in Form D, *scilicet*, 23 November 1981. The very point we have taken was considered and discussed some two months ago in *Griffiths & Anor. v. Secretary of State for the Environment & Anor*. [1983] 2 WLR 172, 188 in which the House of Lords held that when the Secretary of State gave a decision on an appeal under the Town and Country Planning Act, 1971 against a refusal of planning permission, the six weeks provided for in that Act for making an application to the High Court to quash the order on certain limited grounds ran from the date when the decision was made and not from the date when notice of it was received by the aggrieved person and that the decision was made on the date stamped on the decision letter. Lord Bridge of Harwich in his opinion in that case said (at p. 188):

> When a letter recording a decision of the Secretary of State made `hereby' has been typed, signed on behalf of the Secretary of State and date-stamped, it seems to me that the process of decision making is complete and that the letter itself is not the less a decision of the Secretary of State because it is still in his power to revoke it.

The decision of the Minister in the instant appeal is embodied in Form D prescribed in the Industrial Relations Regulations, 1980 which records his decision made 'hereby' and was typed and signed by him and dated 23 November 1981. The process of decision making by the Minister was then complete and his decision was accordingly given on that date 23 November 1981.

The appellant was as a result without the time prescribed in O. 53 r. 1A and neither sought an extension of time nor accounted for the delay to the satisfaction of the learned Judge within its explicit requirements. Leave should not therefore have been granted to the appellant to apply for *certiorari* and the learned Judge had no jurisdiction to do so. On this ground we dismissed the appeal before us with costs and directed the deposit lodged in Court by way of security to be paid out to the respondents.

Also found at [1983] 2 CLJ 7